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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1928.

NO. 75

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

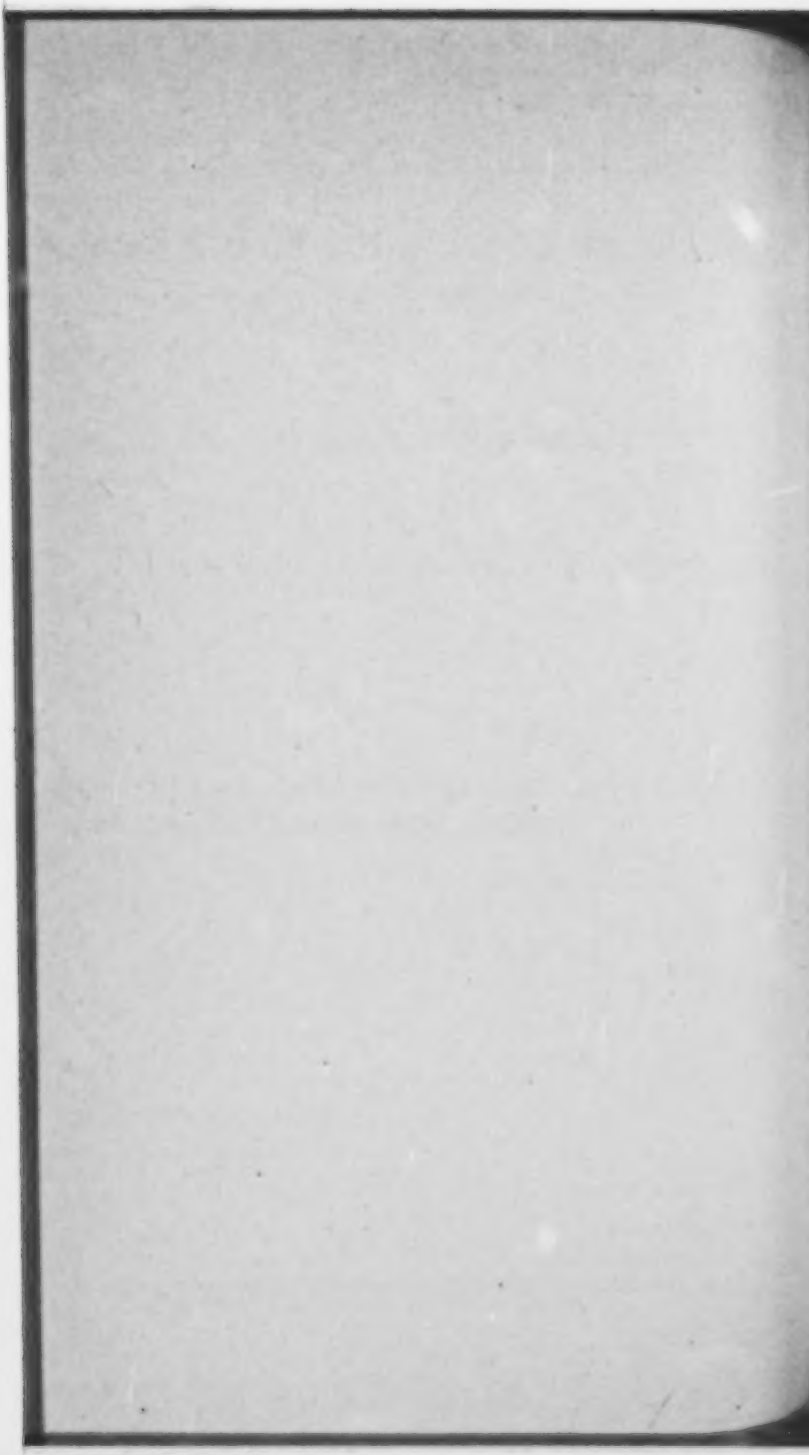
G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STANLEY B. HOUCK,
Attorney for Respondent.

W. YALE SMILEY,
Of Counsel.

Hayward Brief Co., 601-5 Fourth Ave. So., Minneapolis



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INTRODUCTION.

Respondent respectfully states and represents in opposition to the petition for writ of certiorari of the above named petitioner that:

(1) Respondent acquiesces in the correctness of petitioner's statement of the importance of the case (Petition, pp. 3, 4).

(2) Respondent, also, acquiesces in the correctness of the statements of petitioner relative to conflict of decisions (Petition, p. 5).

(3) Respondent, however, respectfully urges and represents to this Honorable Court that the judgment and decision of the Circuit Court of Appeals for the Eighth Cir-

cuit rendered on the 20th day of February, A. D. 1929, is right and correct; and that there is no error therein which requires or warrants review by this Honorable Court.

STATEMENT OF CASE.

Respondent acquiesces in the correctness of petitioner's statement of the case (Petition, pp. 6-9).

CONTENTION OF RESPONDENT.

It is respondent's position and contention in opposition, and in answer, to the petition that the true measure of damages for the breach of a contract to transport and deliver coal or other like personal property at a certain place and time is the fair, average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed. It is the amount it would have been necessary for the shipper and owner to pay in the open market at the time and place of delivery for such a quantity and kind of coal or other property as the carrier failed to deliver as it agreed.

Crail vs. Illinois Central Railroad Company, 13 Fed. (2nd) 459.

Respondent has at no time sought the recovery of retail price. Respondent has at all times sought to recover the value in the market at destination at the time the shipment arrived there, of the 5,500 pounds of coal lost from the car. Respondent has, also, insisted that the value of the lost 5,500 pounds of coal must be determined in the destination market in reference to quantities of 5,500 pounds; that that value can not be determined by reference to any other quantity.

PRAYER.

Respondent respectfully prays and urges that a writ of certiorari be denied to the petitioner and that this cause be not reviewed and determined by this court.

STANLEY B. HOUCK,
Attorney for Respondent.

W. Y. SMILEY,
Of Counsel.

State of Minnesota,
ss.
County of Hennepin.

Stanley B. Houck, being duly sworn, makes oath that he is the counsel for respondent in the above cause and that he prepared the foregoing brief for respondent in opposition to the petition for writ of certiorari, and that the allegations therein contained are true as he verily believes.

STANLEY B. HOUCK.

Subscribed and sworn to before me this 15th day of May, A. D. 1929.

C. A. BRUCE,
Notary Public,
Hennepin County, Minnesota.

My commission expires January 8, 1930.

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May it please the court:

As petitioner states in its petition (Petition, p. 2), both parties agree that the market value at destination is the measure of the damages. The real difference and issue between the parties therefore must be solely and only what the market value of the 5,500 pounds of coal lost from the shipment in question was at destination. The question presented is merely one of determination of the value of the 5,500 pounds of coal lost from the shipment. Respondent contends that that value must be determined in exactly the same way that value must be determined in any other case—that this case is no different from and involves nothing more than any other case requiring a determination of value.

Respondent respectfully urges that the contention and po-

sition of petitioner involves a contradiction. After asserting that both parties agree that the market value at destination is the measure of the damages, petitioner demands that value at destination be found to be a figure at which the stipulation of facts (Rec., 8, 9) conclusively shows the lost 5,500 pounds of coal could *not* have been obtained in the market at destination when the remainder of the shipment arrived there.

Respondent respectfully presents the following analysis and statement of its position and contention:

I.

The measure of damages is the value of the commodity which has been lost at the time and place at which it should have been delivered, with interest, less the transportation charges, if they have not been paid.

This is the common law rule stating the measure of damages for loss in transit by a common carrier. The rule has not been changed or affected, so far as this case is concerned, by the so-called Cummin's Amendment to the Interstate Commerce Act (Act. Cong. Aug. 9, 1916; U. S. Comp. St., Sec. 8604a).

Chicago, M. & St. P. Ry. Co. vs. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504, 64 L. Ed. 801.

Leominster Fuel Co. vs. New York, N. H. & H. R. Co., 258 Mass. 149, 154 N. E. 831.

Crutchfield & Woolfolk vs. Hines, 239 Mass. 84, 131 N. E. 340.

Woonsocket M. & P. Co. vs. New York, N. H. & H. R. Co., 239 Mass. 211, 131 N. E. 461.

Hoover & Co. vs. Denver & R. G. W. R. Co., 17 Fed. (2nd) 881, 886.

Allen vs. Adams Express Co., 77 Pa. Super. 174.
Atlantic Coast Line Ry. Co. vs. Roe, Fla., 118 So. 155, 156.

Petitioner states (Petition, p. 2):

"Both parties agree that the market value at destination is the measure of the damages."

The United States District Court in both of its decisions adopted this rule as that applicable to the case.

Crail vs. Illinois Cent. R. Co. (D. C. Minn.), 2 Fed. (2nd) 287; 21 Fed. (2nd) 836.

II.

If the commodity be a staple which, like coal, is produced for sale and consumption, not for retention and long use, the only inquiry to be made in reckoning its value is its worth as an article of sale. If it be shown that at the destination, at the time the remainder of the shipment arrived there, there was a market in which like coal in volume was openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its loss.

The foregoing statement is taken almost verbatim from an opinion of the U. S. Circuit Court of Appeals for the Third Circuit.

U. S. vs. New River Collieries Co., 276 Fed. 690.

The decision of the Circuit Court of Appeals was later affirmed by the U. S. Supreme Court, which quoted and specifically affirmed the foregoing principle.

U. S. vs. New River Collieries Co., 262 U. S. 341, 43 Sup. Ct. 565, 67 L. Ed. 1014.

Section V, paragraph (a), of the stipulation of facts (Rec., p. 4), states facts which brings this case within the foregoing rule, and establishes the existence of a market at destination:

> "At the destination of said shipment on October 17, 1922, for a long time prior thereto, and ever since, coal of the kind, size and grade contained in said shipment and coal of many other kinds, sizes and grades, had a free and ready market in any quantity, whether less or more than one ton, or by the carload or by a number of carloads. The sales and purchases in said market from day to day were substantial in number and volumes."

III.

If the quantity of the coal bought and sold affects the prices current in the market, fair market value must be determined by ascertaining the prices current in the market for the purchase or sale of the quantity the value of which is to be determined.

Section V, paragraph (d), of the stipulation of facts (Rec., p. 9), fully establishes the destination market value of coal in the amount lost from the shipment:

> "(d) On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser in lots of 5,500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less. At and prior to the time of delivery of said shipment less than carload lots

of coal had not been sold in said market and delivered to or into any car on track as aforesaid."

The United States Supreme Court has given us a complete definition of market value:

"In the matter of Cliquot's Champagne, Judge Hoffman defined the market value of goods to be 'the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade'; and the definition was approved by this court. *Cliquot's Champagne,* 3 Wall. 114, 125, 142."

Muser vs. Magone, 155 U. S. 240, 249.

"The expressions actual value, market value, or market price, when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales public or private in the way of ordinary business. *Century Dictionary; Anderson's Law Dictionary; Murray vs. Stanton,* 99 Mass. 348; *Cliquot's Champagne,* 3 Wallace 114."

Sanford vs. Peck, 63 Conn. 486, 493.

The above quoted paragraph of the stipulation of facts specifically states that "said coal in said quantity * * * could not at said time have been purchased in said market for less." Paragraph (c) of Section V of the stipulation of facts (Rec., p. 9), states with reference to carload values at point of shipment that "quantities of less than carload lots were not obtainable in said market at said time and place at said price," $5.50 per ton. Paragraph (b) contains the

same statement with reference to the carload price at destination, $5.75 per ton.

There can scarcely be any serious contention that the market value of 5,500 pounds of coal is any less price per ton than the only price at which it can be freely and readily secured in the market. The only market value for 5,500 pounds of coal which the evidence in this case discloses is $13.00 per ton.

IV.

In determining the value of the commodity which has been lost, the inquiry is limited to the time when the shipment from which the loss occurred was delivered at destination. It is improper to inquire into later events such as whether plaintiff in error was under any necessity of making replacement, or did in fact replace, or that he was a coal dealer, making purchases in carload lots from time to time as his necessity required, which purchases included coal of the kind and quality here in question, of which on the arrival of the carload from which the loss occurred, he had sufficient for his needs until the arrival of the next carload of the same kind which should be purchased.

The foregoing principle has been specifically decided by the Supreme Court of Massachusetts, which used the following language:

> "The property is to be estimated in the same manner as it would be, if a jury could have been called on the spot, at the moment the damage was discovered, to estimate it. They would consider the market value of the day. * * * The drawback afterwards allowed by the Government * * * was a casual and accidental advantage, accruing afterwards, and originating in a meas-

ure which took place after the facts fixing the plaintiff's claim to damages had all occurred."

Stone vs. Codman, 15 Pickering (Mass.) 297, 300.

The Supreme Court of the United States has considered the same subject and stated its opinion thereon as follows:

"The general tendency of the law, in regard to damages, at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds vs. Mapes-Reeve Construction Co.,* 177 Massachusetts 41, 44."

Southern Pac. Co. vs. Darnell-Taenzer Co., 245 U. S. 531, 534.

V.

The true measure of damages for the breach of a contract to transport and deliver coal or other like personal property at a certain place and time is the fair average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed. It is the amount it would have been necessary for the shipper or owner to pay in the open market at the time and place of delivery for such a quantity and kind of coal or other property as the carrier failed to deliver as it agreed.

The simple market value, not its component parts nor the sources from which it is derived nor its other concomitants, shall measure such damages.

Crail vs. Illinois Central Railroad Co., 13 Fed. (2nd) 459.

Atlantic Coast Line Ry. Co. vs. Roe, Fla., 118 So. 155.

Heidritter Lbr. Co. vs. Central R. Co., 122 Atl. 691, 125 Atl. 926.

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St. L. & S. F. Ry. Co. vs. Watkins, 45 Tex. Civ. App. 321.

VI.

Conclusion.

It is respectfully contended and urged by respondent that the petition should be denied and a review of the judgment and decision of the Circuit Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

STANLEY B. HOUCK,
Attorney for Respondent.

W. YALE SMILEY,
Of Counsel.